WANG KAI HENG v. PUBLIC PROSECUTOR.

[Court of Appeal (Foster Sutton, C.J., Taylor and Wilson, JJ.) May 28, 1951]

[F. M. — Criminal Reference No. 3 of 1951]

Minor Offences Ordinance s. 34(1) — Fraudulent possession of property — Burden on accused person — Courts Ordinance 1948 s. 34.

This was a reference made to the Court of Appeal as a result of a certificate given by the Public Prosecutor under section 34 of the Courts Ordinance 1948. The question asked in the reference was whether in a trial under section 34(1) of the Minor Offences Ordinance the failure or otherwise of an accused person to account satisfactorily how he came by the property is to be judged by whether what he said in explanation might reasonably have been true and not by whether he was telling the truth.

Held, that the proper test to be applied in cases of this kind is that laid down in **R. v. Aves** [2] that is "where the only evidence etc. not guilty".

Cases referred to:—

(1) *R. v. Garth* (1949) 1 All E.R. p. 773.

(2) *R. v. Aves* (1950) 2 All E.R. p. 330.

(3) *Tan You v. Public Prosecutor* 11 M.L.R. 50; (1951) M.L.J.

CRIMINAL REFERENCE.

C. S. Jayaswal for the appellant.

T. R. Hepworth (D.P.P.) for respondent.

Cur. Adv. Vult.

The judgment of the Court was delivered by:—

Foster Sutton, C.J.: — This Reference came before us as a result of a certificate given by the Public Prosecutor under the provisions of section 34 of the Courts Ordinance, 1948. The question asked in the Reference is stated as follows:—

"Whether in a trial for an offence under section 34(1) of the Minor Offences Ordinance (S.S. Ordinance Cap. 24) of being in possession of anything which may be reasonably suspected of being stolen or fraudulently obtained the failure or otherwise of the appellant to account satisfactorily how he came by the same is to be judged by whether what he said in explanation might reasonably have been true and not by whether he was telling the truth."

The appellant was charged and convicted before a magistrate of a offence under section 34(1) of the Straits Settlements Minor Offences Ordinance (Cap. 24). An appeal by him against that conviction was heard by Abbott, J. In the course of an oral judgment the learned Judge said that the test in cases such as this "is not as to whether the appelant was telling the truth — the test is whether what he said might reasonably have been true".

Mr. Hepworth, on behalf of the Public Prosecutor, argued that Abbott, J's. statement regarding the test applicable in cases of this kind was too restrictive and that it was very near the one examined and held to be wrong by the Court of Criminal Appeal in England in the case of *R. v. Garth* [1].

In that case the learned Deputy Recorder stated the law in this way:—

"Anyway, the prosecution have to prove guilty knowledge, and, in the absence of any explanation by the accused man, you are entitled to convict him of receiving stolen goods knowing them to have been stolen — if he fails to give an explanation which you can possibly believe. If, on the other hand, he gives an explanation, and that is one which, although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted."

As Lord Goddard, C.J., in the course of delivering the judgment of the Court of Criminal Appeal said, that statement was far too favourable to the accused "because any explanation may possibly be true". We think that there is a considerable difference between the learned Deputy Recorder's statement of the law and the one made by Abbott, J. Abbott, J's. statement of the law may be an over-simplification of the principles applicable, and to that extent open to objection, but we cannot agree that a statement that an accused should be acquitted if his explanation "might possibly be true" is anywhere near the proposition that he should be acquitted if his explanation "might reasonably be true".

In our opinion, the proper test to be applied in cases of this kind is that laid down by Lord Goddard, C.J. in *R. v. Aves* [2], when he said:—

"Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however the explanation offered is one which leaves the jury in doubt whether he knew the property was stolen, they should be told that the case has not been proved and, therefore, the verdict should be Not Guilty."

Shortly before delivering judgment in this case, Abbott, J. delivered judgment in another appeal, *Tan You v. Public Prosecutor* [3] and it is clear from his statement regarding the law in that case that he had no doubt as to the proper test applicable in cases such as this.

The learned Public Prosecutor has invited us to say that the proper test applicable is whether the explanation given by an accused person is "the truth". That seems to us to lose sight of the fact that when the burden of proof rests upon an accused person it is not as heavy as the burden of proof which rests upon the prosecution to prove its case beyond all reasonable doubt, and is a very different proposition to that which entitles the Court to convict in this type of case if it is

satisfied that the explanation offered by the accused is "untrue".

Mr. Hepworth intimated that he did not wish to go into the merits of this case. That being so, we make no order on this Reference, and the order made by Abbott, J. will, therefore, stand.

No order.

K. P. Y. ISMAIL v. S. SINNIAH.

[Orig. Civ. Juris. (Abbott, J.) April 30, 1951]

[Malacca — Civil Suit No. 81 of 1950]

Courts Ordinance (1948) s. 5(2) — Service of Summons — Summons may be served anywhere within the Federation — Rules of the Supreme Court Order 11 Rule 1.

This was an application to have a writ of summons dismissed on the ground that the writ, which was issued in the Settlement of Malacca, was served in the State of Johore. Reliance was placed upon Order 11 Rule 1 of the Rules of the Supreme Court (Straits Settlements) which provides that a writ should not be served outside the limits of the settlement without the prior sanction of the Court.

Held, that Section 5(2) of the Courts Ordinance gave power to serve the summons anywhere within the Federation of Malaya and therefore the application must be dismissed.

CIVIL SUIT.

S. Shunmugam for the plaintiff.

C. S. Jayaswal for the defendant.

Abbott, J. : — The first two grounds of the application have not been pursued and only the third ground remains for determination.

The plaintiff has commenced proceedings against the defendant upon a writ issued out of the High Court in the Settlement of Malacca. The plaintiff lives in Malacca and the cause of action appears to have arisen in Malacca; the defendant resides in the State of Johore and the writ was served upon him there. Application is now made that the action be dismissed on the ground that the writ was served upon the defendant outside the limits of the Settlement without the prior sanction of the Court as provided for in Order 11 rule 1 of the Rules of the Supreme Court (Straits Settlements), 1934. These rules were made under the authority of the Court Ordinance, (Cap. 10) of the Laws of the Straits Settlements. Following upon the Federation of Malaya Order in Council, 1948, the Settlement of Malacca became part of the Federation of Malaya, but Cap. 10 of the Laws of the Straits Settlements continued to be the valid law of the Settlement until it was repealed and replaced by the Courts Ordinance, No. 43 of 1948. This last-named enactment applies in respect of the whole of the Federation of Malaya and contains a sub-section, material to the present application, as follows :—

> 5(2). All summonses . . . . and other processes whatsoever, whether civil or criminal, issued . . . by the authority of any Court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served . . . anywhere within the Federation."

The Straits Settlements' Rules of Court, however, remain operative within the Settlement of Malacca by virtue of section 110(3) of the Courts Ordinance, 1948, because they have not been revoked and replaced; but the operation of rule 1 of Order 11 has been restricted by the express provisions of the sub-section set out above. I can see no inconsistency or conflict between the rule and the sub-section. It is clear that the intention of the present Courts Ordinance was to confer a jurisdiction throughout the Federation of Malaya; rule 1 of Order 11 has become restricted insofar as it now requires the sanction of the Court only where service is sought to be effected upon a person outside the boundaries of the Federation of Malaya, of which the Settlement of Malacca is now a part.

The application is dismissed with costs.

WOON SIAK v. LIM THIAN CHEE.

[App. Civ. Juris. (Paul Storr, J.) May 5, 1951]

[J. B. — Rent Assessment Board Application No. 13 of 1950]

Control of Rent Ordinance 1948 s. 13(1)(d) — Whether notice to quit is essential before application is made for possession.

This was a reference made by the Johore Bahru Rent Assessment Board which raised the question whether a notice to quit was necessary before an application for recovery of possession under Section 13(1)(d) of the Control of Rent Ordinance 1948 is made. Counsel for the applicant submitted that no notice to quit was necessary as the application was based on the allegation of a nuisance or persistent annoyance caused by the respondent to the wife of the applicant and he submitted that the committing of the nuisance was a breach of the implied condition of the tenancy and therefore it was not necessary to serve a notice to quit to determine the tenancy. Counsel for the respondent relied on Section 13(3) of the Control of Rent Ordinance and argued that it was obligatory on the applicant first to serve a notice to quit determining the tenancy.

Held, that on the facts of this particular case a notice to quit was not necessary before bringing the application for possession under Section 13(1)(d) of the Control of Rent Ordinance.

RENT ASSESSMENT BOARD APPLICATION.

P. V. Charry for the applicant.

M. Ismail for the respondent.